

ORIGINAL

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

RECEIVED
OCT 31 1996
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Definition of Markets for Purposes of the)
Cable Television Mandatory Television)
Broadcast Signal Carriage Rules)

CS Docket No. 95-178

Implementation of Section 301(d) of the)
Telecommunications Act of 1996)

Market Determinations)

DOCKET FILE COPY ORIGINAL

To: The Commission

COMMENTS OF TIME WARNER CABLE

Time Warner Cable ("Time Warner"), a division of Time Warner Entertainment Company, L.P., hereby submits Comments in response to the Commission's Further Notice of Proposed Rulemaking ("Further Notice") regarding the definition of television markets for purposes of the Commission's mandatory television broadcast signal carriage ("must-carry") rules.^{1/} Time Warner is a multiple system operator ("MSO") that operates cable systems throughout the country.

The Commission's Report and Order in this proceeding explains that a transition from television markets based on Arbitron Ratings Company's areas of dominant influence

^{1/}Report and Order and Further Notice of Proposed Rulemaking, CS Docket No. 95-178, 11 FCC Rcd 6201 (1996) ("Further Notice").

No. of Series rec'd
LIB. 1001.0

049

("ADIs") to those based on Nielsen's designated market areas ("DMAs") is necessary because the market modification mechanism used by the Commission relies on a commercially published ADI market list that is no longer being updated.^{2/} In the Further Notice, the Commission seeks "comment on mechanisms for facilitation of the transition from a market definition based on ADIs to one based on DMAs."^{3/} Time Warner urges the Commission, in making this transition, to follow the directives of Congress, as well as the Commission's own previous findings, that broadcasters and cable operators are to be given equal treatment and that the potential for disruption to viewers be minimized.

Currently, once the Commission's Cable Services Bureau (the "Bureau") renders a market modification decision, the Commission gives cable operators second-class status when it comes to acting on requests to stay such decision pending reconsideration. Such a result is contrary to the laudable goal of avoiding viewer disruption. For example, in response to a petition for mandamus before the U.S. Court of Appeals for the D.C. Circuit, the Commission recently stated that it would not object to a stay of the Bureau order modifying the ADI market of station WEYS(TV), Key West, Florida, regarding three cable systems for purposes of the must-carry rules.^{4/} The effect of the Bureau order would have been to allow those systems to discontinue carriage of WEYS, which the Bureau concluded did not

^{2/}Id. at ¶ 1.

^{3/}Id. at ¶ 49.

^{4/}See Response Of The Federal Communications Commission To Emergency Petition For A Writ Of Mandamus, filed September 25, 1996, In Re WEYS Television Corp. (D.C. Cir., No. 96-1351).

provide local service to the cable communities.^{5/} The Commission's September 25, 1996 court brief, however, claims that while neither it nor the Bureau have been able to formulate an "official interpretation" of the Cable Act on the matter, the station "may well be entitled to carriage" under the law until all proceedings before it are completed.^{6/} Time Warner understands that on September 27, 1996, the court entered an order granting the aforementioned stay,^{7/} and as a result, WEYS continues to be carried pending the outcome of the appeal, and the status quo is preserved.

In contrast to this decision, which appears to represent a new interim policy, the Commission has previously refused to temporarily stay the effect of Bureau orders denying a cable operator's market modification request and has required the operator to add a station not previously carried, despite the ensuing alteration of the status quo, disruption to the channel lineup, confusion to cable subscribers, unnecessary costs of notifying subscribers, and loss of goodwill.^{8/} Thus, under the current Commission policy, if a television station loses a market modification decision, it can obtain a stay and not be dropped from carriage

^{5/}Dynamic Cablevision of Florida, Ltd. and Continental Cablevision of Jacksonville, Inc., d/b/a Comcast of Broward County, Inc. and Continental Cablevision of Broward County, Inc. For Modification of the Miami-Ft. Lauderdale, Florida ADI, 11 FCC Rcd 9880 (Cable Serv. Bur. 1996).

^{6/}In Re WEYS Television Corp., *supra*.

^{7/}See Order, filed September 27, 1996, In Re WEYS Television Corp. (D.C. Cir., No. 96-1351).

^{8/}See Cablevision Systems Corporation; Time Warner New York City Cable Group Petitions For Stay Pending Reconsideration, DA 96-1231, 1996 FCC Lexis 4133 (Cable Serv. Bur., Aug. 2, 1996). See also Complaint of WNYC Communications Group Against Time Warner New York City Cable Group, 8 FCC Rcd 4528 (Mass Media Bur. 1993) (denying stay of order requiring repositioning of station's cable channel).

on the cable system, but if a cable system loses a market modification decision, it is not entitled to a stay and must add the affected television station. Clearly, this policy is unfair and inconsistent. It contravenes the express intent of Congress, as well as the Commission's own articulated views, that cable operators and broadcasters must be treated the same in market modification proceedings.

Section 614(h)(1)(C)(i) of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") provides, in relevant part:

The Commission may, with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.^{9/}

The statute makes absolutely no distinction between how cable operators and television broadcast stations should be treated regarding market modification petitions. The legislative history to this section also reflects Congress' intent to afford equal treatment to broadcasters and cable operators in market modification proceedings. According to the House Report,

the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.^{10/}

^{9/}47 U.S.C. § 534(h)(1)(C)(i) (emphasis added).

^{10/}H.R. Rep. No. 628, 102d Cong., 2d Sess. 97 (1992) (emphasis added).

In fact, the House Report specifically acknowledges that cable operators have a legitimate interest in filing market modifications to delete a television station in the same ADI that cannot be considered local:

The provisions of subsection (h)(3)(B) reflect a recognition that the Commission may conclude that a community within a station's ADI may be so far removed from the station that it cannot be deemed part of the station's market.^{11/}

It is thus indisputable that a cable operator's right to seek deletion of its cable communities from a television station's market is just as valid as a station's right to request addition of communities to its market.

Accordingly, the Commission's Report and Order implementing the 1992 Cable Act's must-carry and market modification provisions treats cable operators and broadcasters equally. As the Commission stated in its Report and Order "[w]e will allow either broadcasters or cable operators to file market modification requests since both parties have legitimate interests in such matters."^{12/}

The Commission also stated in the Report and Order that, "[d]uring the pendency of a[n ADI market modification] petition before the Commission, cable operators will be required to maintain the status quo with regard to signal carriage."^{13/} In a recent decision granting a request by Time Warner to delete several cable communities from a television station's ADI, the Commission interpreted the language of the Report and Order

^{11/}Id.

^{12/}Report and Order in MM Docket Nos. 92-259 et al., FCC 93-144, 8 FCC Rcd 2965 (1993) ("Report and Order") at ¶ 46.

^{13/}Id.

to require cable operators to preserve the status quo of their channel line-ups upon the filing of a market modification petition, even one that asks for a station to be deleted from a particular market. The Report and Order language reflects a judgment that there is a strong public interest benefit in maintaining the status quo because it helps avoid unnecessary and unwanted subscriber disruption caused by possible channel line-up changes due to the addition of broadcast signals by the operator and subsequent Commission orders sanctioning the deletion of the same signal. In addition, cable operators would be spared the unnecessary costs of notifying subscribers of channel line-ups which, once a decision is rendered by the Commission, might change once again.^{14/}

Thus, the Commission has acknowledged that cable operators should be treated the same as broadcasters in market modification proceedings, and that maintaining the status quo regarding carriage minimizes viewer disruption.

Indeed, the Administrative Procedures Act ("APA") prohibits the Commission from making actions, findings or conclusions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" ^{15/} As the United States Court of Appeals for the D.C. Circuit stated in Farmers Union Central Exchange, Inc. v. F.E.R.C., the APA requires that "the agency has examined the relevant data and articulated a reasoned explanation for its action including a 'rational connection between the facts found

^{14/} Memorandum Opinion and Order in DA-96-828, 11 FCC Rcd 6514 (1996) at ¶ 30 (emphasis added).

^{15/} 5 U.S.C. § 706(A).

and the choice made."^{16/} Accordingly, the courts have required the Commission to treat similarly situated parties the same.^{17/}

Therefore, there is no basis for the Commission to discriminate against cable operators in addressing petitions for stays of Bureau ADI market modification decisions. As demonstrated above, the Commission has explained that cable operators should not have to add television stations pending market modification proceedings because the ensuing viewer disruption, unnecessary costs and loss of good will (should the cable operator win and be permitted to then drop the station) is not in the public interest. For the same reason, granting a cable operator's request for stay of a Bureau decision ordering carriage of a station, where the cable operator has lost a Bureau market modification decision, is in the public interest, in order to avoid the very same disruptions. Granting such cable operator stay requests, where similarly situated broadcasters are granted such requests, is also required by the APA.

WHEREFORE, Time Warner Cable respectfully requests that, in transitioning from ADI-based to DMA-based market modification procedures, and beginning immediately under the current ADI-based framework, the Commission must follow clear Congressional

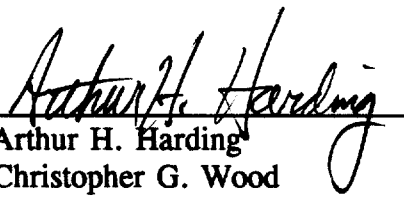
^{16/}Farmers Union Central Exchange, Inc. v. F.E.R.C., 734 F.2d 1486, 1500 (D.C. Cir. 1984), quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962) (footnote omitted). See also City of Chicago v. F.P.C., 385 F.2d 629 (1967).

^{17/}See, e.g., Melody Music, Inc. v. FCC, 345 F.2d 730 (D.C. Cir. 1965) (setting aside and remanding Commission's decision to deny an AM licensee's renewal where the Commission, almost simultaneously and without explanation, granted a similarly situated licensee's renewal).

guidance, as well as the Administrative Procedures Act, and treat cable operators the same as broadcasters, including when acting on petitions for stay of Bureau market modification decisions.

Respectfully submitted,

TIME WARNER CABLE

By: 
Arthur H. Harding
Christopher G. Wood
Matthew D. Emmer
Scott H. Kessler

Fleischman and Walsh, L.L.P.
1400 Sixteenth Street, N.W.
Sixth Floor
Washington, D.C. 20036
(202) 939-7900

Its Attorneys

Date: October 31, 1996